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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

KEEN A. UMBEHR,

Cross-Petitioner,

v.

GLEN HEISER AND GEORGE SPENCER,

Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether government officials who take retaliatory action against an independent contractor for speech on matters of public concern are entitled to qualified immunity.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Respondent, Keen A. Umbehr, respectfully requests that, in the event the Petition for a Writ of Certiorari submitted by Petitioners Glen Heiser and George Spencer is granted, a writ of certiorari be granted to review that portion of the judgment of the United States Court of Appeals for the Tenth Circuit finding that Petitioners are entitled to qualified immunity.

OPINIONS BELOW

Complete references to the opinions below are contained in Respondent's Brief in Opposition (Br. Opp.) at 1-2.

JURISDICTION

The jurisdictional foundation for this action is discussed in the Petition for Writ of Certiorari (Petition) at 2. Petitioners' request for rehearing was denied by the court of appeals on February 10, 1995. This Conditional Cross-Petition is filed within ninety (90) days of that decision. Sup. Ct. R. 13(.1) and (.4).

STATEMENT OF THE CASE

Respondent brought suit against Petitioners in both their official and individual capacities, alleging that his contract with Waubunsee County, Kansas, for residential solid waste collection was terminated based on his public criticisms of the County Commission. The Complaint maintained that this action constituted a violation of his rights under the First and Fourteenth Amendments to the United States Constitution.[1]

The district court granted summary judgment to Petitioners, concluding that even if Respondent's

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[1]A more complete discussion of the pertinent facts and procedural background is contained in Respondent's Brief in Opposition. Br. Opp. at 3-9.

allegations were true, Petitioners were entitled to consider Respondent's speech on matters of public concern in deciding whether to continue the contractual relationship. Petitioners' Supplemental Appendix (Supp. App.) 41a. Based on this conclusion, the district court found that Petitioners were also entitled to qualified immunity against all claims brought against them in their individual capacities. Supp. App. 48a-49a.

The United States Court of Appeals for the Tenth Circuit reversed the district court's decision, finding that the First Amendment prohibits official retaliation against independent contractors for speaking out publicly about the manner in which government affairs are conducted. Petitioners' Appendix (App.) 30a. The court, however, affirmed the grant of qualified immunity to Petitioners in their individual capacities. App. 31a. Without extended discussion, the court held that Petitioners "should be qualifiedly immune from Mr. Umbehr's claim for damages against them in their individual capacities, given the uncertainty in this area of the law." *Id.*

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

Despite its adherence to a consistent line of authority from this Court and its application of existing circuit precedent, the court of appeals found that an independent contractor's right to speak out on political issues without fear of official reprisal was not "clearly established" at the time Respondent's contract was terminated, and thus it found that Petitioners were entitled

to qualified immunity. Because this decision conflicts with the holding of the Fifth Circuit in *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995), prior rulings of the Tenth Circuit itself, and analogous decisions from this Court, conditional review of this important First Amendment question is appropriate.

I.

REVIEW IS NECESSARY TO RESOLVE CONFLICTING RULINGS AMONG THE COURTS OF APPEALS

Government officials performing discretionary functions may be held individually liable for their conduct in situations where their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court of appeals' conclusion that Petitioners violated no clearly established constitutional constructs by taking adverse action against Respondent based on his speech is in direct conflict with the holding of the Fifth Circuit. *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). Because the government has no cognizable interest in retaliating against speech that is critical of its policies, the court in *Blackburn* held that adverse actions taken in response to protected expression constitute a violation of an individual's "First Amendment rights and that any reasonable official in [that] position should have so realized." *Id.*

Should the Court agree to review the court of appeals' finding that independent contractors are protected by the First Amendment from retaliatory action, the existence of conflicting authority in these two circuits regarding the availability of qualified immunity in such cases counsels in favor of reviewing this substantially related question. Resolution of the official capacity questions will clarify the contours of independent contractors' First Amendment rights and thus will necessarily aid the analysis of whether a public official who has retaliated against an independent contractor for engaging in speech on matters of public concern has violated a clearly established constitutional right. Accordingly, if the Court grants Petitioners' request for a writ of certiorari concerning the claims against Petitioners in their official capacity, then it should simultaneously resolve a difference of opinion among the circuits on the closely connected question regarding Petitioners' individual liability for their unconstitutional actions.

II.

THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH A PRIOR DECISION OF THAT COURT AND IS OTHERWISE ERRONEOUS

In addition to the existence of contrary authority in other circuits, the court of appeals decision is also in conflict with its own precedents, which established, prior to the Petitioners' decision to terminate Respondents' contract, that independent contractors are protected by the First Amendment from retaliation based on their speech.

In *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), the Tenth Circuit addressed a claim brought by a tow truck operator who alleged that he had been removed from a referral list maintained by the local police department based, in part, on his support for an unsuccessful mayoral candidate. The jury found for the plaintiff and awarded compensatory and punitive damages against the local police chief in both his official and individual capacities. *Id.* at 1230. The district court, however, entered judgment notwithstanding the verdict for the defendant. *Id.*

On appeal, the Tenth Circuit reversed, finding that government officials may not withdraw government benefits in retaliation for speech.

> [E]ven though a person has no 'right' to a valuable government benefit and even

> though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech.

Id. at 1233 (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). Based on this holding, the court reinstated that portion of the monetary award founded on plaintiff's First Amendment claim as well as the jury's award of punitive damages. *Id.*

The Tenth Circuit's opinion in *Abercrombie* was issued nearly a full year prior to Petitioners' decision to terminate Respondent's contract. At the particular time that Petitioners acted, therefore, the law in the Tenth Circuit was clear both that independent contractors were protected by the First Amendment from retaliation for speech and that government officials engaging in such conduct could be held individually liable for their actions. As a result, Petitioners were not entitled to immunity from individual liability because the court of appeals had already established, consistent with this Court's precedents, that such retaliatory action constitutes a violation of the First Amendment. *See, e.g., Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (law is "clearly established" when decided by court of appeals for that jurisdiction).

Moreover, not only does the Tenth Circuit's own precedent clearly establish that any form of official retaliation in response to speech on matters of public concern constitutes a clear and unequivocal infringement on First Amendment freedoms, but, as explained in Respondent's Brief in Opposition, every court of appeals to have addressed the question at the time of Petitioners' actions had come to precisely the same conclusion. Br. Opp. at 11-13. In fact, the only case to reach a contrary result, *Downtown Automobile Parks v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991), was decided several months after the January 1991 decision to revoke Respondent's business relationship with the County.[2]

In addition, this Court has never suggested, in any context, that government officials possess an unqualified right to punish speech on matters of public concern. On the contrary, the Court has consistently emphasized that governmental entities must establish a substantial or compelling interest in regulating speech before actions that chill or inhibit public debate will be sustained. Br. Opp. at 19-20. No decision from this Court, therefore, would provide a government official with any conceivable basis for concluding that retaliation against an independent

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[2]Although several courts had concluded prior to Petitioners' decision that independent contractors are not protected by the First Amendment from patronage based contracting decisions, App. 11a-13a, the court of appeals properly concluded that these decisions have "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." App. 29a. *See also* Br. Opp. at 14-15.

contractor for speech on matters of public concern would be consistent with established First Amendment tenets.

In view of existing precedent from this Court, the Tenth Circuit, and other circuits, Petitioners simply could not reasonably conclude that the termination of a contractual agreement in retaliation for Respondent's critical public statements comported with existing First Amendment principles. Indeed, the law at the time of the decision clearly established that government officials may not wield their economic power over citizens as a device to control the content of public debate or to silence vocal opponents of their policies. Moreover, these precedents are moored not in a pedantic understanding of arcane legal principles, but in the commonsensical notion that the First Amendment guarantees all citizens the right to participate in public debate without fear of unwarranted official reprisals. Accordingly, the Tenth Circuit's conclusion that Petitioners violated no clearly established constitutional right when they terminated Respondent's contract in retaliation for his criticism of their actions is in error.

CONCLUSION

For these reasons, should the Court grant Petitioners' request for a Writ of Certiorari, the Conditional Cross-Petition for a Writ of certiorari should similarly be granted.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether government officials who take retaliatory action against an independent contractor for speech on matters of public concern are entitled to qualified immunity.

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BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

Cross-Respondents, Glen Heiser and George Spencer respectfully request that the Court deny the Conditional Cross Petition for Writ of Certiorari.

OPINIONS BELOW

The decision of the U.S. District Court for the District of Kansas granting summary judgment to petitioners is reported as *Umbehr v. McClure, et al.*, 840 F.Supp. 837 (D.Kan. 1993). The decision of the Tenth Circuit Court of Appeals, reversing the grant of summary judgment to petitioners in part and remanding the case for further proceedings against petitioners in their official capacities is published as *Umbehr v. McClure, et al.*, 44 F.3d 876 (10th Cir. 1995). Parallel proceedings in state court between the same parties have resulted in two published decisions: see *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992).

STATEMENT OF THE CASE

Cross-Petitioner filed a civil rights action alleging that two members of the Board of County Commissioners of Wabaunsee County, Kansas violated his First Amendment rights by voting to terminate his trash hauling contract. The case was resolved by Motion for Summary Judgment in the District Court. Among the grounds raised for summary judgment was qualified immunity for the defendants in their individual capacities due to the absence of a clearly established constitutional right on the facts.

In deciding the Motion for Summary Judgment the District Court merely assumed, without proof, that the actions of defendants were taken for the purpose of retaliating against plaintiff's exercise of First Amendment rights. No direct evidence of either retaliatory intent or any wrongful intent was offered by plaintiff in support of his claim of retaliatory motive. The

undisputed facts show that plaintiff not only made public statements which included personal accusations against defendants, but also that he was a political opponent who was running for election to the Board of County Commissioners. Defendants have consistently denied that their votes were motivated either by an intent to retaliate against any speech acts or the fact of plaintiff's political opposition. Defendants asserted on summary judgment that the discovery record showed only that they had voted on the basis of independent policy considerations wholly separate and apart from the occurrence of any protected activities.

For a more detailed statement of the dispute between the parties, reference to the Statement of Facts in defendants' own Petition for Writ of Certiorari is recommended.

REASONS FOR DENYING THE WRIT

The Conditional Cross Petition for Certiorari should be denied. The decision of the Tenth Circuit Court of Appeals to affirm the grant of summary judgment to defendants Heiser and Spencer based on the application of the doctrine of qualified immunity was manifestly correct. The decision on this issue is not in conflict with any decision of this Court or of any other Circuit Court of Appeals.

I. THE COURT OF APPEALS' APPLICATION OF THE DOCTRINE OF QUALIFIED IMMUNITY WAS BOTH CORRECT AND WHOLLY UNCONTROVERSIAL, AND RAISES NO ISSUE WHICH IS WORTHY OF REVIEW BY THIS COURT.

Cross-Petitioner suggests that an artificial distinction should be drawn between political patronage cases and retaliation cases in deciding whether the termination of a government contract was clearly established as an actionable violation of the speaker's civil rights in January, 1991.

Cross-Petitioner's suggestion that the existence of a retaliatory motive somehow exempts these defendants from the protection of qualified immunity was squarely addressed and rejected by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). The *Harlow* case recognized that earlier qualified immunity cases had allowed the imposition of liability where the defendant acted with the malicious intention to cause a deprivation of

constitutional rights. See discussion at 457 U.S. pp. 815-818, where the so-called "subjective element" was rejected and the test of qualified immunity was reduced to a solely objective standard. *Harlow* also specifically noted that the doctrine of qualified immunity is available in addition to, and not as an alternative to, other recognized doctrines of absolute immunity. See 457 U.S. at p. 818, footnote 30.

The subjective element of the qualified immunity test was removed for the stated reason that it was undermining the intended purpose of the qualified immunity doctrine, the resolution of insubstantial claims at or before summary judgment. The *Harlow* opinion specifically disallowed discovery concerning the intent of the individual defendants until the threshold question of the objective state of the law had been determined. See discussion at 457 U.S. 818.

The suggested distinction between cases of alleged malicious retaliation and cases of alleged political patronage would directly contravene this holding, either by reintroducing the need to conduct discovery on the defendant's state of mind prior to resolution of the qualified immunity issue, or by substituting a presumption of merit wherever malice is alleged, and denying a qualified immunity defense merely because malicious intent is alleged.

Cross-Petitioner erroneously assumes that the only legal precedents relevant to the determination of the application of qualified immunity were those which had been published prior to the date on which his contract was formally terminated. This Court has clearly held to the contrary. In the case of *Davis v. Scherer*, 468 U.S. 183, 82 L.Ed.2d 139, 104 S.Ct. 3012 (1984) the application of qualified immunity to events occurring in 1977-79 was upheld on the basis

of a conflict between Fifth Circuit Court of Appeals decisions before and after the offending conduct, with specific reliance on a 1981 decision. See discussion at 468 U.S. pp. 191-192, including footnote 9. The footnote observed that the Circuit Courts are presumed to know their own prior decisions and to correctly construe them, in deciding questions of qualified immunity.

This court subsequently affirmed the comments appearing in footnote 9 of *Davis*, again stating that a court engaging in review of a qualified immunity judgment should use its knowledge of both its own precedents and of those of other courts. See *Elder v. Holloway*, 510 U.S. ____, 127 L.Ed.2d 344, 114 S.Ct. 1019 (1994).

When the rule of *Davis* and *Elder* is applied to the decision of the Tenth Circuit Court of Appeals in this case, the correctness of the decision is obvious and not worthy of review by this Court. The

Tenth Circuit has exercised its competency to interpret its own prior decisions and determine whether they do or do not clearly establish an alleged constitutional right in the present factual context. The court was correct in looking to decisions from other Circuits both before and after January, 1991, in determining whether the rights claimed by Cross-Petitioner were well established.

Cross-Petitioner alleges that the Tenth Circuit Court of Appeals misinterpreted its own decisions and the decisions of other Circuit Courts of Appeal in concluding that the state of the law was not sufficiently settled at that time to impose liability on these facts. This suggestion is clearly contrary to the comments of this Court in *Davis* and *Elder*. Despite the existence of a general holding about the rights of persons without a full blown property interest in an earlier Tenth Circuit of Appeals opinion, later Tenth Circuit opinions plainly show

that Cross-Petitioner's rights can only be described as tenuous or arguable, and plainly were not clearly established in 1991. See *Fry v. Board of County Commissioners of Baca County*, 7 F.3d 936 (10th Cir. 1993) where it was held that alleged First Amendment retaliatory intent was irrelevant and legislative immunity applied to the vote of a Colorado Board of County Commissioners to vacate a road, allegedly in direct retaliation for the plaintiff's exercise of First Amendment rights. Therefore the alleged conflict between the holding in the present case and one prior decision is not controlling.

The panelist who wrote the opinion in the present appeal and the District Court Judge who granted summary judgment on the issue of qualified immunity are highly qualified experts in the field of civil rights who are far better able to understand the scope of the rights and duties of the

parties than the defendants could ever hope to be. It is absurd to suggest that the individual defendants should have had a better appreciation of the law than these experts. If these experts cannot even conclude in hindsight that defendants' conduct was clearly wrongful, then no reasonable person in defendants' position could possibly have done so using only foresight.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS OR WITHIN THE TENTH CIRCUIT CONCERNING THE APPLICATION OF QUALIFIED IMMUNITY WHICH WOULD JUSTIFY REVIEW.

Cross-Petitioner alleges a conflict between the decision of the Tenth Circuit Court of Appeals in this case and the decision of the Fifth Circuit Court of Appeals in the case of *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995) as a basis for granting certiorari on the issue of qualified immunity. These two decisions are not in conflict with one another.

In the present case the Tenth Circuit Court of Appeals determined that qualified immunity should apply to defendants Heiser and Spencer for two separate reasons. First the Court of Appeals agreed with the decision of the District Court on the issue, which held that conflicting decisions among the circuits concerning the rights of independent contractors under the First Amendment prevented the right in question from being "clearly established." Second, the Tenth

Circuit Court of Appeals in the present case held that qualified immunity was especially appropriate because they agreed with the statement of the District Court that application of absolute legislative immunity on the facts presented was "a close question."

In *Blackburn v. City of Marshall, supra.*, the Fifth Circuit Court of Appeals addressed the application of qualified immunity to public officials who did not allege that they were acting in a legislative capacity. The *Blackburn* case was decided on appeal from a dismissal on the pleadings, not on appeal from a summary judgment based on a well developed discovery record. The specific holding in *Blackburn* was only that the complaint sufficiently alleged a violation of First Amendment rights which were well established. See 42 F.3d at p. 935.

Neither *Blackburn v. City of Marshall, supra.*, nor any of the cases discussed in it addresses the application of qualified immunity to officials whose primary responsibilities are legislative in nature, rather than administrative. Under the doctrine of legislative immunity public officials are not liable for legislative votes they cast, even if the votes are cast with a malicious intent to cause harm. See *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951). Legislative immunity applies to state and local officials acting in a legislative capacity. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979) and *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 64 L.Ed.2d 641, 100 S.Ct. 1967 (1980).

Cross-Petitioner does not suggest that any court has ever ruled that members of a Board of County Commissioners voting to

terminate public contracts are not protected by legislative immunity. No decision of the Tenth Circuit Court of Appeals suggests that legislative immunity is even a close question on similar facts, let alone a doctrine which is clearly established not to apply. The case of *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990) did not involve any claim of immunity, whether qualified or absolute, and did not involve persons who were arguably acting in a legislative capacity.

If the alleged conflict exists, it demonstrates only that the decision of the Fifth Circuit Court of Appeals misinterpreted or misapplied the clear and unambiguous holding of *Harlow v. Fitzgerald, supra.*, and not that any unresolved issue of law exists on which the advice of this Court is needed.

CONCLUSION

The Cross Petition should be denied due to its obvious lack of merit and the need to put to rest the anxieties of the defendants over their exposure to personal liability.

Respectfully submitted,

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